IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 228

SUN LIFE ASSURANCE COMPANY OF CANADA,
Petitioner,

vs.

RUTH P. BULL,
Respondent.

PETITION FOR WRIT OF CERTIORARI, SUPPORTING BRIEF, AND APPENDIX.

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MAY IT PLEASE THE COURT:

Sun Life Assurance Company of Canada, a Canadian corporation, respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

The Company issued, in the State of Florida, to a naval aviation cadet, a $10,000 policy of life insurance which excluded from the risk "death, as a result directly or indirectly, of service, travel, or flight in any species of aircraft" (Pltf. Ex. A and 1, R. 23, 131, 154).

On February 5, 1942, the insured was in command of a United States naval aircraft in the Pacific southwest which was intercepted by a Japanese war plane, badly damaged (R. 47, 53, 70) and forced to land on the water near the shore of Amboina Island, Dutch East Indies (R. 47, 53-4, 59). Some of the crew started toward shore from the aircraft in a rubber life raft (R. 60, 67). Insured, as commander, and three others remained on the aircraft, procuring code books and secret data, destroying material that might be of aid to the Japanese, and inflating a rubber boat, preparatory to leaving (R. 60, 61, 67). The plane was strafed by the enemy, an explosion occurred, and insured was never seen again (R. 48, 49, 60, 61).

The insured died a hero's death; a claim by his widow, regardless of policy provisions, evokes every human sympathy.

However distressing the circumstances, it stuns the intellect to say that a man whose plane was first shot out of the air and then exploded on the water, killing the man, did not come to his death directly or indirectly as a result of his air service, travel or flight. Yet a majority of the Seventh Circuit Court of Appeals, after ignoring every authority on the subject, has arrived at that result and affirmed (R. 183) a judgment of liability for the full amount of the policy entered by the District Court for the Southern District of Illinois, Northern Division.

Judge Major held to the contrary (R. 188), pointing out that "the importance of the court's action [was] such as to justify" the writing of a dissenting opinion because of the necessity of not allowing hard cases to make bad law that ultimately reacts to the disadvantage of insureds.

Many companies (see appendix) have long written policies supposedly excluding the extreme and unpredictable

hazards associated with air service or travel of any description be it private, military or commercial, but including, within the coverage, ordinary war risks not excluded by the aviation clause. Whether such insurance can longer safely be written (except at prohibitive rates), depends upon the outcome of this case.

II.

Questions Presented.

1. Did the Circuit Court of Appeals for the Seventh Circuit properly consider the law of the State of Florida and does its decision conform with that law?

2. On the undisputed facts did insured come to his death "as a result, directly or indirectly, of service, travel, or flight in any species of aircraft"?

III.

Reasons Relied on for Allowance of Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local (Florida) law without citing or distinguishing the local decisions and in a way probably in conflict with them.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is probably untenable and, therefore, probably in conflict with the Florida law, as yet unannounced by the highest court of that state.

The Florida Supreme Court has held that aviation exclusion clauses are to be observed and not whittled away. However, that court has not had occasion to pass upon facts analogous to those at bar. Other State Courts, and other Circuit Courts of Appeal, as shown by Judge Major's dissenting opinion (R. 188), have

decided such cases contrary to the majority opinion here. Presumably the Florida Supreme Court, if it had decided this case, would have followed its previous principles and the uniform authority throughout the country in analogous cases.

This decision will have a far more profound and widespread influence than a routine Florida local decision. For two reasons:

First, a high federal court has undertaken, for the Florida courts, to depart from the general principles enunciated by that state's Supreme Court, and from the specific holdings of federal and other state courts upon analogous facts. Because this departure was made by a high federal court rather than merely by another state tribunal it assumes added force.

Secondly, it is now public and common knowledge that thousands of aviation cadets in the early stages of war and immediately prior thereto were trained in Florida and obtained insurance while temporarily in that State. Supposedly, that insurance covered the risks to which all persons are subject, but excluded all risks directly or indirectly resulting from their extremely hazardous occupation. Cases involving their policies may and will, like this one, arise throughout the country. If the instant illogical decision is permitted to stand as the law of Florida, governing such policies it will have widespread effect. In the interest of sound public policy, this court should exercise its supervisory powers of review.

3. This court of necessity must grant certiorari in many cases concerning construction, enforcement and constitutionality of Congressional enactments. It also has the duty of superintending Federal courts in their disposition of common law cases. Those cases comprise a large volume and are of tremendous importance. Unless, in appropriate circumstances, certiorari is granted in them, the value of this court is appreciably lowered. The possibility of review by this court is a deterrent to error. However,

if in practice, granting of certiorari is restricted to so-called "public" cases, the deterrent vanishes in other types of cases.

Prayer.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify to and send to this court, for its review and determination, upon a day certain to be therein named, a full and complete transcript of record of all proceedings in said Circuit Court of Appeals in the case numbered and entitled on its docket No. 8369, Ruth P. Bull *vs.* Sun Life Assurance Company of Canada, and that the judgment of said Circuit Court of Appeals for the Seventh Circuit, upon said review, may be reversed by this Honorable Court and petitioner have such other and further relief in the premises as is meet.

SUN LIFE ASSURANCE COMPANY OF CANADA,

Petitioner.

By SILAS H. STRAWN,
EUGENE R. JOHNSON,
GEORGE B. CHRISTENSEN,
GERARD E. GRASHORN,
Its Attorneys.

EDWARD J. WENDROW,
Of Counsel.

SUPPORTING BRIEF.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 141 F. (2d) 456. It appears in this record at page 183. The dissenting opinion commences at page 188.

II.

Jurisdiction.

(1) Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. 347, (certiorari).

(2) Rule 38.

(3) Dates of the decisions to be reviewed: March 15, 1944, original decision; April 7, 1944, denial of petition for rehearing.

III.

Statement of the Case.

The case and its leading facts have been succinctly stated in the preceding petition. They are more fully developed in the opinions of the judges below (R. 183, *et seq.*).

The majority opinion states (R. 186) as a fact, that because insured was last seen inflating a rubber boat preparatory to leaving the plane, that [his] "service, travel and flight in that plane had come to an end." This is not a correct conclusion either legally or factually. Be-

cause he was on the plane he had been in the original encounter; because he had not completed all of the duties incident to his service he was still on the plane at the time of the explosion. Moreover, the majority's statement evades the real question which is not whether insured came to his death while in actual service, travel or flight, but is—did his death occur as a result, directly or indirectly, of such service, travel or flight.

IV.

Specification of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court and in failing to reverse that judgment.

The Circuit Court of Appeals erred in failing to apply the law of Florida and in failing to hold that the death of the insured was the result, directly or indirectly, of service, travel or flight in aircraft.

V.

AUTHORITIES AND ARGUMENT.

Authorities.

1. Under the law of Florida, aviation exclusion agreements in insurance policies are to be enforced according to the terms and not to be whittled away by fine spun refinements.

Travelers' Ins. Co. v. *Peake*, 82 Fla. 128, 89 So. 418.

2. Under the law of Florida, in the absence of ambiguity, insurance contracts are to be construed according to the sense and meaning of the terms which the parties have used, and if clear and not ambiguous, those terms are to be taken and understood in their plain and ordinary sense.

Goldsby v. *Gulf Life Ins. Co.*, 117 Fla. 889, 158 So. 502.

Aetna Casualty & Surety Co. v. *Cartmel*, 87 Fla. 495, 100 So. 802.

3. The decisions of courts of other jurisdictions construing aviation exclusion clauses even more favorable to the insured than in the present case, under comparable facts, have uniformly denied recovery, thus demonstrating that the decision of the Circuit Court of Appeals is probably in conflict with the law of Florida, as yet unannounced by its highest court.

Neel v. *Mutual Life Ins. Co.*, 131 F. (2d) 159 (C. C. A. 2).

Pittman v. *Lamar Life Ins. Co.*, 17 F. (2d) 370 (C. C. A. 5), Cert. denied, 274 U. S. 750.

Wendorff v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S. W. (2d) 99.

Blonski v. *Bankers' Life Co.*, 209 Wis. 5, 243 N. W. 410.

Richardson v. *Iowa State Traveling Men's Ass'n.*, 228 Ia. 319, 291 N. W. 408.

Murphy v. *Union Indemnity Co.*, 172 La. 383, 134 So. 256.

4. The uniform authority is that the word "indirectly" in an insurance policy includes a cause of death which is a remote or contributing cause. These cases likewise demonstrate that the decision of the Circuit Court of Appeals is probably in conflict with the law of Florida, as yet unannounced by its highest court.

Amicable Life Insurance Co. v. *O'Reilly*, (Ct. Civil App., Texas), 97 S. W. (2d) 246.

Runyon v. *Western & Southern Life Ins. Co.*, 48 Ohio App. 251, 192 N. E. 882.

Szymanska v. *Equitable Life Insurance Co.*, (Superior Ct. of Del., 1936), 183 Atl. 309.

Coxe v. *Employers Liability Assurance Corp.*, 2 King's Bench 629 [1916].

Bouchard v. *Prudential Ins. Co.*, 135 Me. 238, 194 Atl. 405, 407.

5. The Court had no authority to ignore plain policy provisions.

Bergholm v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492.

Argument.

The aviation exclusion clause is in the broadest possible language—"death as a result, directly or indirectly, of flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed" (Pltf.'s Exs. A and 1, R. 23, 131.)

More comprehensive language could not have been chosen. As plainly as could be done, the Company endeavored to avoid, and not be bound by, the theory of "Proximate Cause". The natural meaning of the language is to exclude from coverage a death which resulted *either proximately or remotely* from service, travel or flight in an aircraft. **We say that it is manifest that if the flight, travel or service contributed to the result of death that the company is not liable,** and that no amount of reasoning by hypothetical cases, such as was engaged in by the majority of the court, can properly change that plain situation.

The majority opinion below nullifies the words of the policy and virtually requires that the death result proximately from an airplane accident. Thereby it places upon the company a risk it never contracted to assume. The dissenting judge demonstrates (R. 188) that the majority opinion is indefensible both on the basis of authority and the plain language of the contract. As he aptly observed, disregard of clear provisions in the long run "will do more harm to those seeking insurance protection by making it more difficult to obtain." (R. 189.)

The majority opinion avoids the authorities, avoids the real question in the case, and purports to reason by analogy from hypothetical situations which are not analogous. The misconceptions which pervade it are clearly demonstrated by its toying with the word "result." The majority says:

> "When we consider results that produced death, as provided in the policy, and not contributory causes, which were not the limiting terms of the provision, it is clear that the contract does not support the contention of the defendant."

The foregoing is utter sophistry. *Results* do not *produce* anything but themselves are the *product* of *causes*.

When a contract excludes liability for "death as a result," it would hardly seem debatable that this means "death which is caused by."

We recognize that this Court does not grant certiorari to review every erroneous judgment of a Court of Appeals. However, it should be granted here because the Court utterly failed to give consideration to the law of Florida as required by *Erie R. R.* v. *Tompkins*, 304 U. S. 64. The result is not merely an erroneous decision, but one contrary to the principles laid down by the highest court of that state.

The policy was issued in Florida; suit was brought in the United States District Court for the Southern District of Illinois. The Court of Appeals in deciding what state law governed construction of the policy was required to follow the Illinois conflict of laws rule (*Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487), that insurance policies are to be construed according to the laws of the state in which issued (*Moscov* v. *Mutual Life Ins. Co.*, 320 Ill. App. 281; *Rose* v. *Mutual Life Ins. Co.*, 144 Ill. App. 434, aff'd. 240 Ill. 45; *Jay-Bee Realty Corp.* v. *Agricultural Ins. Co.*, 320 Ill. App. 310). Consequently, in applying the doctrine of *Erie R. R.* v. *Tompkins*, the Court was required to apply the law of Florida.

The Supreme Court of Florida has held that aviation exclusion provisions are to be enforced according to their terms. In *Travelers Ins. Co.* v. *Peake*, 82 Fla. 128, 89 So. 418, the Court gave effect to a clause excluding from coverage death while the insured was participating in aeronautics. The court held that a passenger in a commercial plane was a "participant," and said:

> "* * * parties sui juris are bound by their valid contracts, and where a particular risk is expressly and clearly excepted from the risks assumed by the in-

surer, the courts have no power to enforce indemnity for losses or injuries resulting from such excepted risk, as expressed by the indemnity contract * * *."

The Florida Supreme Court also holds that the words of an insurance contract are to be construed in their plain and ordinary sense. In *Goldsby* v. *Gulf Life Ins. Co.*, 117 Fla. 889, 158 So. 502, it is said (p. 503):

> "Both litigants admit the rule that in case of ambiguity an insurance contract is to be construed against the insurer and in favor of the insured, but this rule does not apply when the language of the contract is clear and unambiguous. * * * When there is no room for doubt, insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if clear and unambiguous, these terms are to be taken and understood in their plain and ordinary sense."

Again in *Aetna Casualty & Surety Co.* v. *Cartmel*, 87 Fla. 495, 100 So. 802, the Court stated,

> "* * * language used in a policy of insurance is to be given its popular and usual significance, unless the context requires a different construction."

The majority opinion below, however, utterly ignores the "popular and usual significance," the "plain and ordinary" and broad meaning of "directly or indirectly." It is barren of Florida authority. The only cases which it cites are one decided by the Court of Appeals for the Ninth Circuit and one decided by the California Appellate Court.

It is patent, from the face of the opinion, that the majority reached its conclusion on the basis of its beliefs as to "general law." *Erie R. R.* v. *Tompkins* forbids this. Had the Court given proper effect to the *Peake* and other Florida cases on the construction of insurance policies, it would not have reached the erroneous conclusion that it did.

There is no Florida decision squarely in point on the facts, but the principles of the *Peake* case, the rules of construction announced by the Florida court and the holdings of all other courts in comparable factual situations, necessarily lead to the conclusion that the present decision is "probably untenable and therefore probably in conflict with the state law as yet unannounced by the highest court of the State" (*Cf. Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 206). The courts of all other jurisdictions, as pointed out by the dissent, have denied recovery under comparable factual situations. In several of them the aviation exclusion clauses were more favorable to the insurerd than herein. They did not contain the broad phrase, "directly or indirectly," but were in the more debatable form—"as a result of participation in aeronautics." (*Neel* v. *Mutual Life Ins. Co.* (C. C. A. 2), 131 F. (2d) 159; *Pittman* v. *Lamar Life Ins. Co.* (C. C. A. 5), 17 F. (2d) 370, Cert. denied 274 U. S. 750; *Wendorff* v. *Missouri State Life Ins. Co.*, 318 Mo. 363, 1 S. W. (2d) 99; *Blonski* v. *Bankers' Life Co.*, 209 Wis. 5, 243 N. W. 410; *Richardson* v. *Iowa State Traveling Men's Ass'n.*, 228 Iowa 319, 291 N. W. 408; *Murphy* v. *Union Indemnity Co.*, 172 La. 383, 134 So. 256). The cases just cited are forcefully discussed in the dissenting opinion at bar to which reference is made (R. 188 *et seq.*).

The recent (1942) decision of the Circuit Court of Appeals for the Second Circuit in *Neel* v. *Mutual Life Ins. Co.*, 131 F. (2d) 159 is typical. The headnote of that case accurately states:

> "Death of aviator by drowning while attempting to swim ashore after aeroplane made forced landing at sea resulted from 'participation in aeronautics.'"

It is obvious that the decision at bar cannot be squared with the *Neel* case.

We further contend that the present decision is contrary

to Florida law because the courts in all other jurisdictions uniformly have given effect to the broad scope of the words "directly or indirectly" in insurance policies. **The cases uniformly deny recovery on policies excluding from coverage a death resulting "indirectly" from the type of hazard not covered by the policy. This is on the ground that the word "indirectly" is intended to include a cause of death which may be a so-called remote, or contributing cause. Unless "indirectly" is given such effect, it becomes merely a meaningless, and incorrect, synonym for "directly."** *Amicable Life Insurance Co.* v. *O'Reilly* (Ct. Civil App., Texas), 97 S. W. (2d) 246; *Runyon* v. *Western & Southern Life Ins. Co.*, 48 Ohio App. 251, 192 N. E. 882; *Szymanska* v. *Equitable Life Insurance Co.* (Superior Ct. of Del., 1936), 183 Atl. 309; *Coxe* v. *Employers Liability Assurance Corp.*, 2 King's Bench 629 [1916].

As said by the Supreme Judicial Court of Maine, in a case turning on the phrase "directly or indirectly" (*Bouchard* v. *Prudential Ins. Co.*, 135 Me. 238, 194 Atl. 405, 407):

> "• • • it is not a question what was the proximate cause of the deceased's death. • • • The blows might well be said to be the proximate cause; but, nevertheless, that does not permit recovery under the language of this policy, that cause, although proximate, being accompanied by another contributing cause, the diseased heart."

What the Court in effect did in this case was to obliterate the word "indirectly" from the policy. This it had no authority to do. (*Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492.)

Conclusion.

If the decision below is permitted to stand as the law of Florida it will mean that the United States Courts have adopted for Florida a rule of law different from that of all other states that have ruled on the question, different

from previous Federal decisions and at variance with established Florida principles. And all this in a case which is but the forerunner of others which will be filed in various Federal and State courts throughout the country and which will turn on Florida law.

Attached is an appendix which demonstrates that aviation exclusion clauses similar to the one involved here have been used by a substantial majority of life insurance companies. It is apparent that the companies when including the aviation exclusion clause, without at the same time including a general war risk exclusion clause, intended to cover war risks, but did not intend to cover any risk (whether growing out of war or not) which resulted, directly or indirectly, from service, travel, or flight in an aircraft.

If the decision is permitted to stand there will be cast upon insurance companies heavy liabilities which they never intended to assume and for which they never collected premiums.

Because of the failure of the court below to apply Florida law, which resulted in its reaching an incorrect conclusion, and because of the importance of the question both in regard to the numerous policies now in existence and the terms on which the public can obtain insurance in the future we believe this Court should grant certiorari.

Respectfully submitted,

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EDWARD J. WENDROW,
Of Counsel.

July 1, 1944.

APPENDIX.

The following aviation exclusion clauses are those currently used by the insurance companies hereinafter listed in this Appendix:

(1) "Death as a result, directly or indirectly, of service, travel or flight, in any species of aircraft, except as a fare-paying passenger or on a licensed aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered between specified airports, is a risk not assumed under this policy; but, if the insured shall die as a result, directly or indirectly, of such travel or flight, the company will pay to the beneficiary the reserve on this policy, less any indebtedness thereon."

(2) "Death as a result, directly or indirectly, of service, travel, or flight in or on any species of aircraft is a risk not assumed under this policy; but, if the insured shall die as a result, directly or indirectly of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy."

Forty-nine insurance companies use exclusively Clause No. 1; thirty-two employ exclusively Clause No. 2; and thirty-six employ both of them in varying circumstances. It is to be observed that the words "death as a result directly or indirectly, of service, travel, or flight in any species of aircraft is a risk not assumed under this policy" are found in both of them.

Following the decision in *Metropolitan Life Insurance Company* v. *Conway*, 252 N. Y. 449, 169 N. E. 642 (1930), the American Life Convention submitted to the Insurance Commissioners of the 48 states and the District of Columbia an aviation exclusion clause similar to the one involved in this case. With the clause submitted to the Commis-

sioners there was also submitted the query as to whether or not such Commissioners would approve the clause if submitted to them for their official approval. In answering this inquiry, the Commissioners of 35 states replied expressing unqualified approval of the use of the clause. Eight Commissioners disapproved the clause, three of whom were later overruled by the courts of their respective states. Four Commissioners approved the clause with certain qualifications, one refused to comment and one refused to permit the clause as a rider to a policy, but approved it as a policy provision.

Acacia Mutual Life
Aetna Life
American Bankers Life
American Central Life
American Life & Accident (Ky.)
American Life (Ala.)
American National Life
American Reserve Life
American Savings Life (Ind.)
American Savings Life (Mo.)
American Union Life
Amicable Life
Atlantic Life
Atlas Life
Baltimore Life
Bankers Life Co.
Bankers National Life
Bankers Life of Neb.
Beneficial Life
Berkshire Life
Buffalo Mutual Life
Business Men's Assurance Co.
California-Western States Life
Canada Life Assurance
Capitol Life
Cedar Rapids Life
Central Life Assurance
Central Life of Ill.
Central Life (Kan.)
Central States Life
Church Life
Colorado Life
Columbian Mutual Life
Columbian National Life
Columbus Mutual Life
Commonwealth Life
Conferedation Life Assur.
Connecticut General Life
Connecticut Mutual Life
Conservative Life (Ind.)
Conservative Life (W. Va.)
Continental American Life
Continental Assurance
Country Life
Crown Life
Durham Life
Equitable Life (Ia.)
Equitable Life (D. C.)
Equitable Life Assurance (N. Y.)
Eureka-Maryland Assurance
Farmers and Bankers Life
Farmers and Traders Life
Federal Life
Fidelity Mutual Life
Fidelity Union Life
Franklin Life
General American Life
George Washington Life
Girard Life
Globe Life
Great American Life (Kan.)
Great American Life (Tex.)
Great National Life
Great Northern Life
Great Southern Life
Great Western Life
Great-West Life (Can.)
Guarantee Mutual Life
Guaranty Life
Guardian Life
Gulf Life (Fla.)
Gulf States Life
Hercules Life
Home Life—N. Y.
Home Life (Pa.)—
Home State Life
Imperial Life
Indianapolis Life
Interstate Life & Accident
Jefferson Standard Life
John Hancock Mutual Life
Kansas City Life
Lafayette Life
Lamar Life

Liberty Life (Kan.)
Liberty National Life
Life & Casualty
Life of Virginia
Maryland Life
Massachusetts Protective Life
Massachusetts Mutual Life
Metropolitan Life
Michigan Life
Mid-Continent Life
Midland Life
Midland Mutual Life
Midwest Life
Minnesota Mutual Life
Modern Life
Monarch Life
Montana Life
Monumental Life
Mutual Benefit Life
Mutual Life (Can.)
Mutual Life (N. Y.)
Mutual Trust Life
National Life & Accident
National Life Assur. of Canada
National Life (Ia.)
National Life (Vt.)
National Reserve Life
New England Mutual Life
New World Life
New York Life
North American Life (Ill.)
North American Reassurance
Northwestern National Life
Northwestern Mutual Life
Occidental Life (Cal.)
Occidental Life (N. C.)
Ohio National Life
Ohio State Life
Old Line Life
Old Republic Credit Life
Oregon Mutual Life
Pacific Mutual Life
Pan-American Life
Penn Mutual Life
Philadelphia Life
Phoenix Mutual Life
Pilot Life
Postal Life
Protective Life
Provident Mutual
Provident Life & Accident
Prudential Insurance
Puritan Life
Pyramid Life (Ark.)
Pyramid Life (N. C.)
Reliance Life
Republic Life (Tex.)
Reserve Loan Life
Rockford Life
St. Louis Mutual Life
Scranton Life
Seaboard Life
Security Life & Trust
Security Mutual (Neb.)
Security Mutual (N. Y.)
Service Life
Shenandoah Life
Southland Life
Southwestern Life
State Farm Life
State Mutual Life
State Reserve Life
Sun Life (Can.)
Travelers Ins. Co.
Union Central Life
Union Cooperative
Union Labor Life
United Benefit Life
United Fidelity Life
United Mutual Life
United States Life
Volunteer Life
Washington National Life
West Coast Life
Western & Southern Life
Western Reserve Life (Tex.)
Wisconsin Life
Wisconsin National Life

NOTE: Source of information—"Aeronautics Risk Exclusion in Life Insurance Contracts," Journal of Air Law, July-October, 1936.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RULE CITED.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent urges that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Jurisdiction.

We concede the jurisdiction of this Court under the Certiorari Act to consider a petition for Writ of Certiorari.

Exercise of Jurisdiction.

(1) But we contend that the case at bar presents no circumstances which warrant the grant of certiorari in this cause since the petition shows that the petitioner is seeking "another hearing." (*Magnum Import Co.* v. *Coty*, 262 U. S. 159; 43 S. Ct. 531).

(2) The petition in instant case does not present a question for review on writ of certiorari as defined by Rule 38, 5(a), (b), (c).

(3) The discretion vested in this court to review the decisions of the Circuit Court of Appeals by certiorari will only be exercised in matters of gravity and general importance, and instant case is not of a character to call for the exercise of such discretion. *In Re*: *Woods*, 143 U. S. 202, 12 S. Ct. 417.

(4) The fact that many insurance companies may be interested in obtaining a favorable construction of the aviation clause in instant case does not make the question one of gravity and general public importance.

Reasons Urged in Petition for Writ of Certiorari to Review the Judgment of the Circuit Court of Appeals in Favor of Respondent.

Petitioner, at pages 3 and 4, states the following reasons relied upon for allowance of the writ:

(1) "The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local (Florida) law without citing or distinguishing the local decisions, and in a way probably in conflict with them."

(2) "The decision of the Circuit Court of Appeals for the Seventh Circuit is probably untenable and, therefor, probably in conflict with the Florida law, as yet unannounced by the highest court of that State."

Answer of Respondent to Petition and Reasons Relied Upon for Denial of Writ of Certiorari.

1. Petitioner admits at page 13 of its brief that there is no Florida decision construing the aviation clause contained in the insurance contract here involved, or one passing upon the facts involved in this case.

The decisions of the Supreme Court of Florida stating the rules governing the construction of insurance contracts do not conflict with the decision of the Circuit Court of Appeals rendered in this case, but on the contrary support it.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit is not untenable and is not in conflict with the Florida law, but on the contrary is in accord with the law of Florida and is also in accord with the general law.

3. The death of Richard Bull resulted from warfare and not from aviation.

4. Petitioner joined issue in the District Court upon a question of fact, and that question was decided by the jury, the trial judge and the Circuit Court of Appeals against petitioner, and it is now bound thereby.

5. The policy was issued to Richard Bull while he was an aviation cadet at a time when war was raging in Europe and the United States was making preparation to expend its national defense program, and the policy contained an aviation clause, but did not contain a war clause. The true intent of the petitioner was to include all risks in war.

6. Where an insurance company defends on the ground that death was due to a cause excepted by the policy, it has the burden of proof to establish that fact.

7. Under the decisions of the Florida Courts the incontestability clause precludes a defense for any reason not expressly excluded by the clause itself.

8. The question of whether or not the death of Bull was due to a cause for which petitioner was liable under the policy is for the jury, even though there is no conflict in the testimony, if different inferences may be drawn therefrom.

Summary and Statement of Issues Involved.

Petitioner asks this Court to issue a writ of certiorari in order that this Court may decide the following question: Did the insured under the facts in this case die "as a result, directly or indirectly, of service, travel or flight in any species of aircraft as a passenger or otherwise?" This question was at issue under the pleadings and was developed by the evidence. It was submitted to and answered in the negative by the jury, the trial court, and the Circuit Court of Appeals for the Seventh Circuit. The facts are somewhat unusual, are not likely to reoccur, and are of the utmost importance to the determination of the question.

Petitioner's statement is inadequate and respondent, therefore, makes the following additional statement.

The life insurance policy sued on was issued by the company in the State of Florida, on October 24th, 1939, to Richard Bull while he was an aviation cadet, United States Naval Reserve (R. 148-153). The signed application contained the following questions and answers:

"2. (a) Occupation. Describe your duties exactly.

(a) Aviation Cadet U. S. Naval Reserve.

(b) Have you changed your occupation within the last five years? If so, what was your last occupation?

(c) Have you any intention of changing your present occupation?

(b) Yes—Student (c) No.

(d) Have you within the past two years engaged in any form of aviation as a passenger or otherwise?

(d) Yes.

(e) Do you propose to do so?

(e) Yes." (R. 148).

Thus, it will appear that at the time of the acceptance of the risk by petitioner, Bull was solely engaged in aviation, and that he intended to continue in that employment. The fact that he intended to remain in the services of the government was also communicated to the company and well known by it for the reason that his other insurance as stated in his application, was United States Government insurance in the sum of $10,000.00 (R. 149), and he arranged with petitioner to have the premiums paid on instant policy out of his compensation received from the government while in service (R. 149).

In his application he further stated he was subject to orders from the navy department, and might be sent on foreign duty (R. 137).

If the construction of petitioner is to be adopted, *then the only coverage Bull had under this policy was while he was eating his meals and sleeping.* The premium on the policy was $55.50 per quarter, or a total of $220.00 annually (R. 5), and it is ridiculous to assume that the parties hereto entered into a contract for a consideration of $222.00 per year that only afforded *protection on the life of the insured while he was eating and sleeping.* That unreasonable construction was rejected by the jury, the trial court, and the Circuit Court of Appeals.

An endorsement issued on the date of the policy provided that "Death as a result, directly or indirectly, of service, travel or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy"

(R. 23). The policy does not contain a "war clause" exempting the company from liability in case of death caused by the military or naval service of insured in time of war.

On February 5, 1942, insured, who was then a Lieutenant, junior grade, in the United States Naval Reserve, was commanding officer of a seaplane engaged in patrol duty in the South Pacific (R. 46, 52). While on a patrol flight Japanese warships were located in a harbor, and the seaplane started to bomb them. The plane was hit by an anti-aircraft fire and by Japanese Zeros. The port motor was shot out and the gas tanks filled with holes. They succeeded in losing the attacking Zeros in the clouds, but gasoline poured into the hull and fumes filled the seaplane. The plane made a forced landing on the water at a point ten or fifteen miles from the scene of the encounter and five hundred to one thousand yards off the island of Amboina, Dutch East Indies. The plane did not crash, but after landing could not have flown again without repairs. The motors were stopped in the normal manner, the anchor thrown out, and the seaplane floated on the water for ten minutes (R. 47, 53, 54, 59, 61, 71). Gasoline continued to escape from the tanks of the seaplane and spread over the surrounding water so that the area was in an explosive condition (R. 54, 70).

Two of the plane's crew, Hargrave and Nelson, with a wounded comrade debarked from the plane in a rubber boat and started for shore (R. 60). Up to this point the insured was uninjured (R. 50, 68, 69). Hargrave testified that insured was inside the plane when he last saw him (R. 61). Nelson testified that the last time he saw insured he was outside the plane on the fuselage inflating a second rubber life boat (R. 48).

At this point a Japanese seaplane of a type entirely different from those previously encountered attacked the disable plane from a height of twenty to fifty feet firing incendiary and steel capped bullets from its machine guns.

Insured was exposed to this machine gun fire (R. 49). The first attack did not sink the disabled seaplane, and the Japanese plane circled for a second attack. On the second attack Hargrave and Nelson dived under the water for protection. While under the water the witnesses heard an explosion and on returning to the surface the area where the plane had been was in flames and only a tip of a wing was visible (R. 48, 49, 56, 60, 62, 69). The insured was never seen thereafter.

The policy also contained the following incontestability clause: "This policy shall be incontestable after it has been in force during the lifetime of the assured for a period of two years from the date of issue except for non-payment of premiums and except as to provisions and conditions, if any, relating to Total and Permanant Disability and to Double Indemnity" (R. 19). *The incontestability clause does not by its terms except death resulting from aviation.* Insured died more than two years after the policy was issued and in force.

Plaintiff perfected a cross appeal to the Circuit Court of Appeals contending that the trial court erred in its refusal to hold that the incontestability clause in the policy barred the company from asserting the defense of death from aviation (R. 171-173). By stipulation the original appeal and cross appeal were consolidated in one case (R. 199, 200), and the notice of cross appeal and cross errors and statement of points filed by cross appellant are included in the record in this case (R. 171, 172, 173). The Circuit Court of Appeals having found for plaintiff on the original appeal held that the cross appeal need not be sustained (R. 188). For incontestability clause see Record, page 19.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 141 F. 2nd 456 and is also set forth in the record beginning Page 183.

BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

BRIEF OF AUTHORITIES.

1. **Under the law of Florida insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, insured's claim to indemnity.**

Price v. *Prudential Ins. Co.,* 98 Fla. 1044; 124 So. 817.

Kimbal v. *Travelers Ins. Co.* (Florida Supreme Ct.) 10 So. 2nd 728, 729.

Martin v. *Sun Ins. Office of London,* 83 Fla. 325; 91 So. 363, 366.

Elliott v. *Belt Automobile Ass'n.,* 87 Fla. 545; 100 So. 797, 798.

Sovereign Camp W. O. W. v. *Lee* (Florida Supreme Ct.) 171 So. 526, 528.

Franklin Life Ins. Co. v. *Tharpe* (Florida Supreme Ct.) 178 So. 300, 302.

Inter-Ocean Casualty Co. v. *Hunt* (Florida Supreme Ct.) 189 So. 240, 243.

2. **Death does not result directly or indirectly of service, travel or flight in an aircraft within the meaning of an insurance contract containing such language when a new and independent cause intervenes which in itself results in the death.**

Richmond Coal Co. v. *Commercial Union Assur. Co.,* 169 Fed. 746, cert. denied, 215 U. S. 609; 54 L. Ed. 347; 30 S. Ct. 410.

Pacific Union Club v. *Commercial Union Assur. Co.,* 12 Cal. App. 509; 107 Pac. 728.

Travelers Ins. Co. v. *Johnston,* (Supreme Court Arkansas) 162 S. W. 2nd 480 (1942).

Tierney v. *Occidental Life Ins. Co. of California,* 89 Calif. App. 779; 265 Pac. 400.

3. The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. This Court accepts these findings as the conclusive basis for decision.

When the district court and circuit court of appeals have agreed as to the ultimate facts established by the evidence, their finding will be accepted by this court, unless it clearly appears that they have erred as to the effect of the evidence.

Stuart v. *Hayden, et al.,* 169 U. S. 1, 18 S. Ct. 274.

"On the questions of fact, both courts below decided against the petitioners. Under the well established rule this court accepts the findings in which two courts concur, unless clear error is shown, *Stuart* v. *Hayden,* 169 U. S. 1, 14, 18 S. Ct. 274, 42 L. Ed. 639; *Texas & Pacific Railway Company* v. *Railroad Commission,* 232 U. S. 338, 34 S. Ct. 438, 58 L. Ed. 631; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78, 34 S. Ct. 725, 58 L. Ed. 1220; *Bodkins* v. *Edwards,* 255 U. S. 221, 223, 41 S. Ct. 268, 65 L. Ed. 595.

Texas & N. O. R. Co. v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 50 S. Ct. 427, at 429.

Virginian Ry. Co. v. *System Federation No. 40,* 300 U. S. 515, 57 S. Ct. 592, at 596.

4. The incontestability clause in a life insurance policy, after the expiration of the contestable period, bars and precludes every defense to or contest of the policy on any

ground which is not specifically reserved or excepted in the incontestability clause itself.

Bernier v. *Pacific Mutual Life Ins. Co.* (La. Supreme Ct. 1932) 173 La. 1078; 139 So. 629.

Afro-American Life Ins. Co. v. *Jones* (Fla. Supreme Ct. 1933) 113 Fla. 158; 151 So. 405-406.

State ex rel. Republic Nat. Life Ins. Co. v. *Smrha,* (Neb. Supreme Ct. 1940) 293 N. W. 372, 373.

Northwestern Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155, 159.

(a) The object of an incontestability clause is to create an absolute assurance that the insured or the beneficiary will receive the benefits of the policy.

Northwestern Mutual Life Ins. Co. v. *Johnson,* (U. S. Supreme Ct. 1920) 254 U. S. 96; 65 L. Ed. 155, 159.

State ex rel. Republic National Life Ins. Co. v. *Smrha* (Neb. Supreme Ct. 1940) 293 N. W. 372.

Penn Mut. Life Ins. Co. v. *Childs* (Ga. Ct. of App. 1941) 16 S. E. 2nd 103, 108.

Harris v. *Security Life Ins. Co.* (Mo. Supreme Ct. 1913) 248 Mo. 304; 154 S. W. 68 (70).

(b) The language of life insurance contracts is construed strictly against the insurer.

Aschenbrenner v. *United States Fidelity & Guaranty Co.* (U. S. Supreme Ct. 1934) 292 U. S. 80; 78 L. Ed. 1137, 1140.

Mutual Life Ins. Co. v. *Hurni Packing Co.* (U. S. Supreme Ct. 1923) 263 U. S. 167; 68 L. Ed. 235, 238.

Winer v. *New York Life Ins. Co.* (Fla. Supreme Ct. 1939) 130 Fla. 115; 190 So. 894.

(c) If there is any reasonable doubt as to the extent of the application of the incontestability clause it must be resolved in favor of the beneficiary.

Independent Life Ins. Co. v. *Carroll* (Ala. Supreme Ct. 1930) 222 Ala. 34; 130 So. 402, 404.

Mareck v. *Mutual Reserve Fund Life Ass'n.* (Minn. Supreme Ct. 1895) 62 Minn. 39; 64 N. W. 68, 69.

Royal Circle v. *Achterrath* (Ill. Supreme Ct. 1903) 204 Ill. 549, 570; 68 N. E. 492.

(d) The provisions of the incontestability clause extend to and are for the benefit of the benficiary named in the policy.

Mutual Life Ins. Co. v. *Hurni Packing Co.* (U. S. Supreme Ct. 1923) 263 U. S. 167; 68 Ed. 235, 239.

Monahan v. *Metropolitan Life Ins. Co.* (Ill. Supreme Ct. 1918) 283 Ill. 136, 141; 119 N. E. 68.

(e) Respondent perfected a cross appeal to preserve the point on the ruling of the District Court on the incontestability clause of the policy. The Circuit Court of Appeals did not pass on this question, nor did it reject the theory of respondent in her right to recover under the incontestability clause. The Circuit Court of Appeals simply held that the disposition of the case upon the appeal of petitioner rendered it unnecessary to decide the question raised by the cross appeal. That Court simply said that the cross appeal need not be sustained. This question is still in the case and by stipulation of the parties entered into on June 27, 1944, which was approved by the order of the Circuit Court of Appeals on June 28th, 1944, the cross appeal is made a part of the record in this case, and becomes a part of the record in this Court (R. 199-202).

ARGUMENT OF RESPONDENT.

Petitioner now contends that the only issue in the case is one of law. It had an opportunity in the trial court to have the case tried on the question of law, but it waived its opportunity to do so, and elected to try it as an issue of fact.

The complaint (R. 2-4) was based upon the contract of insurance, a copy of which was made a part of the complaint as Exhibit "A", (R. 5-31), and was in the usual form for recovery on a life insurance policy. Petitioner filed an answer alleging that the death resulted directly or indirectly from service, travel or flight in an aircraft (R. 32-36). Plaintiff filed a reply denying the allegations of the answer as to the cause of death, and affirmatively averred that Richard Bull met his death directly as the result of an attack by the armed forces of the government of Japan against Richard Bull and others of the armed forces of the United States, and that the direct and proximate cause of his death was the attack made upon him by the Japs, and not as a result, directly or indirectly, of service, travel or flight as a passenger or otherwise in a species of aircraft (R. 37-39).

If petitioner desired to raise a question of law upon the facts it had an opportunity to do so after the reply was filed, as then it clearly appeared from the answer and the reply that Bull met his death while engaged in the armed forces of the United States. Petitioner joined issue and the case was tried before a jury.

The issuance of the policy was admitted by the answer, as well as the fact of death. The sole issue before the jury

was whether or not Bull met his death as the result of war, or as the result of aviation. The jury found for respondent. The trial court approved the verdict upon motion for judgment notwithstanding the verdict and for a new trial. The Circuit Court of Appeals has concurred in this finding of fact.

Respondent contends that under the well established rule this Court accepts the findings in which the two courts concur unless clear error is shown, and accepts these findings as the conclusive basis for decision. *Stuart* v. *Hayden, et. al.*, 169 U. S. 1, 18 S. Ct. 274; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, at 429; *Virginian Ry Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592, at 596.

Therefore, respondent contends that the jury, the trial court, and the Circuit Court of Appeals for the Seventh Circuit have decided, that under the facts of this case the insured did not meet his death "as a result, directly or indirectly, of service, travel or flight in any species of aircraft," but that his death resulted from a war risk; i. e., the strafing attack by the Japanese plane. This decision is in accord with the law of Florida where the policy was issued, as well as the general law, and is based upon sound reason and logic.

At the time the policy was issued insured was in training as a United States Navy Aviation Cadet, and this fact was stated in his application for insurance (R. 27). At the time the policy was issued most of the countries of Europe were at war, Japan was at war with China, and preparations for war were being rushed in the United States. With full knowledge of these facts the company issued the policy here involved without inserting in it a war risk exclusion clause, and as petitioner admits in its brief at page 15, the company by said policy "intended to cover war risks."

At the time of the strafing attack by the Japanese plane, the seaplane floated on the water at anchor a short distance from shore. It was disabled and could not fly again without repairs. (R. 47, 53, 54, 59, 61, 71). As was stated by the Circuit Court of Appeals, it was useful only as a raft. The motors were stopped. The seaplane was not on fire. Insured was in good health and uninjured (R. 50, 68, 69). The flight of the seaplane had terminated, all travel in it had ceased, and service in it had ended.

Approximately ten minutes later a Japanese war plane located the disabled seaplane and made a low level strafing attack. When last seen by the witnesses, insured was on the fuselage of the seaplane attempting to inflate a rubber life boat in which to reach shore. The Japanese plane fired its machine guns at the seaplane and insured was exposed to this gun fire (R. 49). Finally bullets from the Jap plane caused a great explosion of the seaplane and of the gasoline on the water around it. Insured was never seen after the strafing attack (R. 48, 49, 56, 62, 69).

Particularly in a case of this character other cases are helpful in reaching a decision only to the extent that they announce the general rules to be applied. After all, each case of this type must be decided largely upon the special facts belonging to it. The foregoing facts reasonably and logically considered in view of the language of the policy, the probable intention of the parties, and the circumstances under which the policy was issued impel one to the conclusion that insured's death resulted from warfare and did not result directly or indirectly from service, travel or flight in an aircraft.

It is admitted by both parties that since the insurance contract was made in Florida the law of that State applies.

Petitioner admits in its brief, page 13, that there is no Florida decision construing the aviation clause contained in this policy or passing upon the facts here involved.

The Florida Supreme Conrt has, however, announced and followed rules for the construction of insurance contracts in accord with the overwhelming weight of authority in other jurisdictions, and also in accord with the decision rendered in this case by the Circuit Court of Appeals.

In the case of *Price* v. *Prudential Ins. Co.*, 98 Fla. 1044; 124 So. 817, the Court considered an insurance policy which provided, "No accidental death benefit shall be payable if the death of the insured resulted * * from having been engaged in aviation * *." At page 819 of its opinion the Court said:

> "A policy of insurance is designed to secure the indemnity stated in the policy, and the terms used should be so construed as to effectuate the purpose designed, ambiguous provisions being fairly construed in favor of the beneficiary of the policy, the purpose of the contract being indemnity. Insurance companies are bound by their valid contracts of insurance, and where a risk is included in or covered by the indemnity contract and is not clearly excepted from the risks assumed by the insurer, the indemnity should be enforced in accordance with the legal meaning and effect of the contract which should be fairly interpreted by a just consideration of the language used, the subject matter, and the object of the indemnity provisions;"

and at page 820:

> "The provision that no accidental death benefit shall be payable if the death of the insured resulted 'from having been engaged in aviation * * * operations' means that the death of the insured must have resulted from having taken part in an aviation operations other than by merely being in an airplane when it fell to the ground and caught fire thereby fatally injuring the insured. Being 'engaged in aviation operations' means taking part in the operations of an

airplane in some direct way, other than merely participating in aeronautics by being in an airplane while it is in the air."

In *Sovereign Camp W. O. W.* v. *Lee,* 171 So. 526, 528, the Florida Supreme Court said:

> "When doubts arise in the interpretation of an insurance policy, they should be resolved in favor of the insured."

In *Franklin Life Ins. Co.* v. *Tharpe,* 178 So. 300, 302, the Florida Supreme Court said:

> "The purpose of a policy of insurance is intended or designed to secure the indemnity stated in the policy. When terms thereof are ambiguous, they should be fairly construed so as to effectuate their purpose, design and intent. This Court has held where there are conflicting clauses in an insurance policy, the one which affords the most protection to the insured will prevail."

Again, in *Elliott* v. *Belt Automobile Assn.,* 87 Fla. 545; 100 So. 797, 798, the Court said:

> "The rule is well established in this jurisdiction that where two interpretations equally fair may be given, that which gives the greater indemnity will prevail."

Again, in *Kimbal* v. *Travelers Ins. Co.,* 10 So. 2nd 728, 729, the Florida Supreme Court said:

> "It is settled law that insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity."

Petitioner asks the Court to construe the words "directly or indirectly" as contained in the aviation exclusion clause

in such manner as to relieve the company of liability in a case where a new and independent cause (having no relation to service, travel or flight by insured in an aircraft) intervenes and itself results in insured's death. Such a construction would "defeat without a plain necessity insured's claim to indemnity." The courts have refused to place such a strained, unreasonable, and unlogical construction upon the words "directly or indirectly."

In the case of *Richmond Coal Co.* v. *Commercial Union Assur. Co.,* 169 Fed. 746; *certiorari* denied 215 U. S. 609; 54 L. Ed. 347; 30 S. Ct. 410, suit was brought on a fire insurance policy insuring coal. The policy provided that the company "shall not be liable for loss caused directly or indirectly by * * earthquake * * or (unless fire ensues, and, in that event, for the damage by fire only,) by explosion * *." The coal was destroyed by fire following the San Francisco earthquake. At page 752 of its opinion the Court said:

> "Under the specific instructions referred to, the jury, in determining whether the earthquake was the proximate or remote cause of the fire that injured the subject of the action, could not be controlled by, nor, indeed, give any consideration to * * whether there were any new or intervening causes between the fires that were started or may have been started by the earthquake and that which caused the loss sued for, such as explosion, backfiring, dynamiting, the course or force of the winds, if any such occurred, * * all of which in our opinion, were proper matters for the consideration of the jury in determining whether fire or fires started by the earthquake were the proximate cause of the damage to the insured coal."

In *Pacific Union Club* v. *Commercial Union Assur. Co.*, 12 Cal. App. 509; 107 Pac. 728, suit was brought on a fire insurance policy which provided, "This company shall

not be liable for loss caused directly or indirectly by * * earthquake." The day after an earthquake, fire broke out. Because the water mains had been broken by the earthquake, water could not be obtained to fight the fire, and the property insured by the policy was destroyed. The insurance company contended that the earthquake was the indirect cause of the loss because it had destroyed the water mains which otherwise would have supplied water to extinguish the fire. The court denied the contention of the insurance company on the ground that it was not reasonable to suppose that the parties to the contract meant by this provision to exempt the company from liability where the connection between the earthquake and the fire was so remote.

In *Travelers Ins. Co.* v. *Johnston*, (1942) 162 S. W. (2d) 480, suit was brought on an accident insurance policy which provided, "This insurance shall not cover accident, injury, disability, death or other loss caused directly or indirectly, wholly or partly, by * * disease." Insured was afflicted with Paget's disease which is a degenerative condition of the bones and was injured when he fell while alighting from a cab. On appeal the insurance company contended that the instructions given by the trial court, including the following, were erroneous:

> "The fact that plaintiff had Paget's disease might have been a necessary element in producing a fall, yet such disease alone does not deprive the plaintiff of the right to recover if you further find from a preponderance of the evidence that the proximate cause of the fall was an accident."

The court there held the instructions were proper, and affirmed the judgment of the lower court.

In the case of *Tierney* v. *Occidental Life Ins. Co. of Cal.*, 89 Cal. App. 779; 265 P. 400, suit was brought on a life

insurance policy which contained the following aviation exception clause: "This policy does not cover any injury, fatal or non-fatal, sustained by the insured while participating or in consequence of having participated in aeronautics." In that case insured was a passenger in an airplane which landed at the airport. After the plane had been stopped at the airport for five or six minutes, and after insured had talked with airport officers, he stepped on to the wing of the plane and on to the ground, and then forward, bent over to avoid a drift wire, and as he straightened up was struck by the propellor which was still in motion. The Court affirmed a judgment for plaintiff's beneficiary, and at page 401 of its opinion said:

> "The flight was not the proximate cause, but there was the intervening act of the deceased in his poor judgment in so conducting himself after climbing out of the machine as to be struck by the propellor."

The opinion of the Circuit Court of Appeals in affirming the District Court (R. 183-188) clearly sets forth the position of respondent. Petitioner knew at the time the policy was written that Bull was an aviation cadet, and that he intended to continue in such service. No war clause was inserted. It is apparent, therefore, that the defendant was willing to, and did assume all risk of war. Therefore, the issue before the jury was, "Was the death of Bull under the cirumstances, a risk of war or of aviation? and, Was his death the result, directly or indirectly, of service, travel or flight in aircraft, or was it a war risk free from aviation?"

The proof in instant case established the fact that before the attack was made by the Japanese, Bull was well, uninjured and possessed all of his faculties; that the aircraft was disabled, lay in the water and could not be flown again. Judge Minton said in the opinion "it was useful only as a raft" (R. 186). Bull was not injured at any time while

the plane was flying or landing. He was not injured by service, travel or flight in the aircraft. His death occurred after the service, travel and flight had terminated. His death resulted from the direct attack by the Japanese as he was attempting to reach land. No risk of aviation was involved in his death. A risk of war resulted in his death, and that was a risk not excluded by the policy. Petitioner at page 15 of its argument, in support of the petition, admits that the company, by writing this policy, intended to cover war risks.

CONCLUSION.

WHEREFORE, respondent respectfully prays that the petition for certiorari be denied.

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